No. 85-2015

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

HARCON BARGE COMPANY, INC., D & G BOAT RENTALS, INC. AND THE M/V CHARLES D TIDEWATER-VENICE, INC. AND THE M/V IBERVILLE, ARTHUR SMITH CORPORATION AND THE M/V I.C. HOSKINS, AND CANAL BARGE COMPANY AND THE M/V MARIAN HAGESTAD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents accept the characterization of the questions presented for review presented by petitioner as Questions I through IV, but add as an additional question Question V, which is set forth below.

V.

Is there any basis for the Court to consider the Petition for Certiorari since the decision of the Court below is not in conflict with the decision of any other federal court of appeals nor is it in any way within the sample parameters set forth in Rule 17.1 of this Court?

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STATEMENT OF THE CASE

This brief is being filed on behalf of D & G BOAT RENTALS, INC., TIDEWATER VENICE, INC., ARTHUR SMITH CORPORATION, HARCON BARGE CO., INC. and CANAL BARGE COMPANY, respondents herein. Unless a specific party is referred to by name, the foregoing parties will be referred to collectively as "RESPONDENTS".

The statement of facts set forth by petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY ("SOUTHERN PACIFIC") is essentially correct and accepted by RESPONDENTS except as is set forth hereinafter.

As was noted in the original opinion rendered by the Court of Appeals, 746 F.2d 278, 284-285, the lawsuit filed by HARCON BARGE CO., INC. which bore Docket No. 79-1592 in the District Court was designated as the lead case when the Court ordered consolidation of all cases. At the time of the consolidation an entry was made on the docket sheet of each case other than the lead case as follows:

> " '*See* 791592 [i.e., *Harcon Barge v. D & G Boat Rentals*] *for all future entries* except those pertaining only to [docket number of the particular action of the consolidated cases].' " 746 F.2d 278, 284.

All of the entires thereafter were made on the docket sheet of *Harcon,* the lead case, including the entry concerning the Motion to Amend, Notice of Appeal and all other post-trial filings in the case.

In the en banc opinion rendered on March 12, 1986 (Appendix I), the Court definitively classified the post-

judgment motion filed by TIDEWATER VENICE, INC. as a motion seeking relief under Rule 59(e) (784 F.2d 665 [5th Cir. 1986]). At Page I-9 the following language occurs in the opinion of the Court:

> "They styled their motion as one to amend or alter the judgment and they served it within ten days after the entry of the judgment. The motion sought relief available under Rule 59(e), did not seek merely to correct a clerical error in the judgment, and was served within that rule's time limits. Although the motion itself does not specify under which rule it was being brought, it nevertheless falls squarely within the province of Rule 59(e)."

—o—

SUMMARY OF THE ARGUMENT

I. The rule adopted by the Fifth Circuit promotes certainty in appellate procedure, comports with the intent of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure and puts to an end any uncertainty or confusion with respect to post-judgment practice.

II. The fact that a particular motion may conceivably be properly made under some provision of Rule 60 does not mean that it is not also a Rule 59(e) motion.

III. A motion to amend the single judgment rendered in consolidated cases affects the judgment in general and, therefore, all cases.

IV. Rule 2 of the Federal Rules of Appellate Procedure does not apply to jurisdictional questions.

V. This case does not fall within the parameters set forth in the Court's rules for granting certiorari.

ARGUMENT

I. Since the 1979 revision of the Federal Rules of Appellate Procedure, the concept of joint jurisdiction over a particular cause by a Federal District Court and a Federal Court of Appeals has ceased to exist. With the decision of this Court in *Griggs vs. Provident Consumer Discount Company,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), notice has been served on all litigants that the provisions of Rule 4(a)(4) are to be literally interpreted and applied.

Such an interpretation and enforcement of the rules serves several purposes, chief of which is the clarification of the timetable applicable to the litigants and clear delineation of which Court has jurisdiction.

Cases on the point show that there is a long history of debate as to whether a motion is cognizable under Rule 59(e), 60(a) or 60(b). Because of this long standing dispute there has been obvious uncertainty as to whether additional notices of appeal were required, whether in fact a particular judgment was appealable, or whether a litigant was prevented from proceeding any further because the litigant's time under Rule 59(e) had expired. For example, the Seventh Circuit noted in *A. D. Weiss Lithograph Co., Inc. vs. Illinois Adhesive Products Co.,* 705 F.2d 249, 249-50 (7th Cir. 1983):

> "It would make life a good deal easier for all concerned if parties moving under Rule 59(e) would always caption such motions 'Motions to Alter or Amend Judgment' rather than 'Motions to Reconsider,' and thereby dispel any doubt whether the motion is under Rule 59(e) or Rule 60(b)—rules with very different procedural consequences as this case illustrates. But

> the caption is not essential. One must look to the body of the motion, and see what the movant wants."

The rule announced by the Fifth Circuit in its en banc decision completely eliminates the necessity of any such characterization of a motion and indeed, eliminates the inquiry. Litigants now know that a motion filed within ten (10) days of the entry of judgment is to be treated as a Rule 59(e) motion. One need not engage in sophisticated and possibly esoteric analysis of the content of the motion, one need only look at the time when the motion was filed.

This specific solution was proposed by the Seventh Circuit when it said:

> "Post-judgment motions filed within ten (10) days should where possible be construed as Rule 59(e) motions to avoid otherwise endless hassles over proper characterization." *Western Industries, Inc. vs. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983).

Other Courts have also felt the same way.

> "In general, a post-judgment motion that questions the correctness of the judgment is properly treated as a Rule 59(e) motion if it is filed within ten (10) days of entry of judgment." *Miller vs. Leavenworth-Jefferson Electric Co-Op*, 653 F.2d 1378, 1380 (10th Cir. 1981); Accord, *Dove vs. CODESCO*, 569 F.2d 807 (4th Cir. 1978); *Vreeken vs. Davis*, 718 F.2d 343 (10th Cir. 1983).

As is obvious from the citations above, the rule adopted by the Fifth Circuit has been advocated and approved by the Fourth, Seventh and Tenth Circuits and has not been criticized by any other Court of Appeal. The rule allows for the finality of judgments absent a strong showing of

extraordinary circumstances which would bring into play Rule 60(a).

Petitioner makes the following statement on Page 14 of its brief:

> "The 'bright-line' rule creates waste, expands the instances in which multiple notices of appeal will be required, and creates a multitude of problems."

Petitioner obviously misapprehends the effect of the rule since the implementation of the rule has the direct opposite effect of that claimed by petitioner. Rather than expanding instances of multiple notices of appeal, the bright-line rule in fact completely eliminates any necessity for multiple notices of appeal except in those cases in which multiple notices could not possibly be avoided even without the bright-line rule. Far from creating a multitude of problems, the appellate process is simplified since, as noted above, neither litigants nor the Courts any longer have to indulge in speculation to conclude whether a specific motion is a Rule 59(e) motion or a Rule 60 motion.

Additionally, petitioner claims that there is no basis for the decision of the Court of Appeal since *Griggs* did not even deal with the application of Rule 60. It is respectfully submitted that even the dissent in the *Griggs* case pointed out that the Courts have " . . . almost without exception treated these as Rule 59 motions, regardless of their label." 459 U.S. 56, 68, 103 S.Ct. 400, 407. Continuing, the dissent pointed out:

> "Indeed, even motions captioned under Rule 60(b) but filed within ten days of judgment, are normally deemed Rule 59 motions."

Even petitioner has relied on Rule 4(a) to obtain dismissal of an appeal. *In Re M D L 262,* 85-2495 (Slip Opinion Filed September 17, 1986) is a case decided by the Fifth Circuit which granted a motion by Southern Pacific to dismiss an appeal which was filed out of time. The court in that case stated:

> "There is a necessity for providing a precisely ascertainable point at which litigation comes to an end." (Slip Opinion 9683, 9687)

Huff v. International Longshoremen's Association Local #24, 86-2212 (Slip Opinion filed September 19, 1986), specifically uses and approves the *Harcon* rule and points out the previous difficulties in classifying motions.

The jurisprudence is uniform and without contradiction that the "bright-line" rule is sensible, comports with the intent of the Rules, ends uncertainty and assists litigants and the Courts alike.

II. SOUTHERN PACIFIC goes to great lengths to urge the contention that the Fifth Circuit vacated on rehearing that portion of the panel opinion which found that TIDEWATER's Motion to Amend Judgment was a Rule 59(e) motion rather than a Rule 60(b) motion. The Railroad further urges in its Petition that the question of identification of the rule under which the TIDEWATER motion was brought was left unaddressed by the Court on rehearing. Even though this point is relevant only to whether or not the motion was a Rule 60(a) motion, this contention conveniently though clearly overlooks and disregards the findings of the Court as expressed in Part A of the opinion on rehearing:

> In the instant case, the moving defendants sought to amend the judgment of the district court as to the

> costs assessed against them. They styled their motion as one to amend or alter the judgment and they served it within ten (10) days after the entry of the judgment. The motion sought relief available under Rule 59(e), did not seek merely to correct a clerical error in the judgment, and was served within that rule's time limits. Although the motion itself does not specify under which rule *it was being brought, it nevertheless falls squarely within the province of Rule 59(e).*
>
> 784 F.2d 665, 668 (5th Cir. 1986). (emphasis provided).

This *en banc* determination by the Court of Appeals is perfectly congruous with the earlier finding by the late Judge Tate as expressed in the original panel opinion:

> The motion to amend was "(a) motion to amend or alter the judgment" under Federal Rules of Civil Procedure 59(e), which had the effect under Federal Appellant Procedure Rule 4(a)(4) of nullifying any previous notice of appeal and, further, of commencing the delay within which to take an appeal only after this motion was disposed of.
>
> *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.,* 746 F.2d 278, 288 (5th Cir. 1984).

Judge Tate purely and simply recognized that the TIDEWATER motion (" . . . which looks and reads like and *is* a Rule 59(e) motion") is not subject to being retrospectively recast on appeal by the Railroad as a Rule 60 motion merely because the relief sought by TIDEWATER may have been obtainable under both rules. This entire contention is manifestly an after-the-fact effort by SOUTHERN PACIFIC to evade the effects of Rule 4(a)(4) in consequence of the Railroad's failure to file a timely notice of appeal.

The authorities cited by the Railroad in its petition, which suggest that the TIDEWATER motion may have been properly assertable under some rule other than 59(e), are inapposite, for exclusivity is certainly not the hallmark of the relief available under Rules 59(e) and 60. See *11 Wright and Miller, Federal Practice and Procedure,* Sec. 2817 at pp. 110-13 (1973). The appropriate inquiry, then, is whether the motion falls within the scope of Rule 59(e), and every court which has considered the TIDEWATER Motion to Amend Judgment has without hesitation recognized that it is indeed a Rule 59(e) motion. Ergo, since the TIDEWATER motion was timely served within ten (10) days of entry of judgment as Rule 59(e) requires, the Court must consider it to be a Rule 59(e) motion for purposes of Rule 4(a)(4) of the Federal Rules of Appellate Procedure, since timing of the motion is fundamental in classifying the motion as having been brought under Rule 59(e) or Rule 60. As a Rule 59(e) motion, the TIDEWATER motion vitiated the effect of the railroad's notice of appeal, and as Professor Moore has observed, under those circumstances "the appeal simply self destructs." 9 *J. Moore, B. Ward and J. Lucus, Moore's Federal Practice,* Sec. 204.12(1), pp. 4-65, n. 17 (1982), quoted approvingly in *Griggs v. Provident Consumer Discount Co.,* 103 S.Ct. 400 (1982).

The record in this case reveals that both the TIDE WATER Motion to Amend Judgment and the SOUTHERN PACIFIC Notice of Appeal were docketed on the same day (December 21, 1982), although the motion appears to have been docketed ahead of the notice on that day. Nevertheless, a *subsequent* notice of appeal is likewise of no effect when it is filed while a timely Rule 59 motion is

pending. Viewed either way, the SOUTHERN PACIFIC notice of appeal is invalid under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, and the action of the Court of Appeals was correct.

III. Petitioner complains in its application that the consolidation of the cases has "deprived petitioner of its precious right of appeal." This is in fact erroneous since consolidation has nothing to do with petitioner being deprived of its right of appeal. What, and all that has occurred is that petitioner is looking for any way out of the position in which it finds itself and is now complaining about the consolidation as a possible avenue of escape.

As was pointed out in the panel opinion in the Court of Appeal, petitioner is the party that moved for the consolidation of all cases. Appendix G 9, 10. Indeed, the notice of appeal filed by petitioner was docketed only in the lead case, the *Harcon* case number 75-1592. Appendix G 11, 12. The panel opinion noted that SOUTHERN PACIFIC in its notice of appeal filed only one notice of appeal and characterized it as appealing from "*the* Final Judgment entered in said actions on the 8th day of December, 1982". Appendix G 13. Continuing, the panel pointed out that petitioner paid only a single filing fee and, in all respects treated its attempted appeal as occurring in a fully and completely consolidated case.

Petitioner is thus on the horns of a dilemma. On the one hand it argues that a motion directed to the judgment is in fact a motion that affects only one of the cases, not all of the cases. However, if that were the case, the attempted appeal of petitioner would be wholly ineffective in any event except for the *Harcon* case, the lead case, in which the notice of appeal was actually filed.

However, obviously that is not the correct result. The five cases have been consolidated throughout, at the instance of petitioner, and over the opposition of the other parties to the suit. Notwithstanding this, the Court, petitioner and all parties have been treating these cases as consolidated for all purposes until this very day. Indeed, to have maintained the separateness of the suits, to have required separate docket entries and, to have preserved their separate character would have vitiated completely the benign purposes of Rule 42(a). The action of the Court of Appeals was eminently correct and should not be disturbed by this Court.

IV. In a last ditch argument, SOUTHERN PACIFIC contends that Rule 2 of the Federal Rules of Appellate Procedure should be invoked in order that the Rules might be suspended and its oversight condoned and then cured. This same argument was unsuccessfully advanced in *Griggs, supra,* where the Supreme Court held that not only was the notice of appeal defective, it was an absolute nullity. In the oft-quoted words of the Court:

> "Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' *Browder v. Director, Illinois Dept. of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978)." Id. at p. 403.

In a footnote, the *Griggs* Court observed that Rule 2 does not purport to vest unlimited discretion in the Court of

Appeals, and any such discretion is limited in any event by Rule 26(b), which prohibits the Courts of Appeals from enlarging the time for filing a notice of appeal. Moreover, the notions of certainty, timeliness and order would be rendered meaningless under a system where Rule 2 could be cavalierly invoked to retrospectively circumvent the explicit prohibitory language of Rule 4(a)(4). There is no compelling purpose which would be served by allowing SOUTHERN PACIFIC to deviate from the letter and spirit of the Federal Rules of Appellate Procedure under these circumstances. In any event, the Court of Appeals did not deem it appropriate in this instance to attempt to invoke Rule 2 and suspend the provisions of Rule 4(a)(4), which would have presumably accorded retrospective validity and new life to the SOUTHERN PACIFIC notice of appeal. That decision was certainly no abuse of discretion by the Court of Appeals, and therefore cannot be challenged here.

V. There is simply no basis for this Court to grant the application for certiorari. As is set forth in Rule 17 of this Court review on Writ of Certiorari is a matter of judicial discretion, not a matter of right. There must be "special and important reasons" for this Court to grant a Writ of Certiorari. It is respectfully submitted that, as is shown above, there is neither a special nor an important reason for this Court to grant the Writ of Certiorari.

There is no conflict in the circuits, as is indicated in the foregoing brief nor is there a decision of a State Court or Federal Court of Appeals whch is contrary or in conflict with the applicable decisions of this Court. In fact, all of the decisions reviewed harmonize with the decision of the en banc Court in this case.

Accordingly, this Court should deny the petition for Writ of Certiorari.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals puts to rest previously existing issues and uncertainties and provides a reliable beacon for litigants to comfortably navigate the rocks and shoals of appellate practice. The "bright-line" rule points the way for appellate practitioners to know what actions should be taken to preserve the rights of their clients. Accordingly, this Honorable Court should deny the application for certiorari.

Respectfully submitted,

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